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84-152

NO.

Office-Supreme Court, U.S.
FILED
AUG 25 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HENRY BREWER, et al.

v.

CITY OF WINSTON-SALEM, N.C., et al.

On Appeal From the North Carolina Court of Appeals

MOTION TO DISMISS OR AFFIRM

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31pp

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August 20, 1984

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MOTION TO DISMISS OR AFFIRM

Appellees are the City of Winston-Salem, North Carolina, and its Mayor and members of its governing board. Pursuant to Rule 16 of the Supreme Court Rules, Appellees move the Court to dismiss the appeal seeking review of the decision of the North Carolina Court of Appeals in the case of Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, et al., 67 N.C.App. 165, 312 S.E. 2d 517, pet. denied, _____ N.C. _____, 315 S.E.2d 701 (1984) [which is referred to by Appellants in their Jurisdictional Statement as Brewer, et al. v. City of Winston-Salem] on the ground that said appeal does not present a substantial federal question. In the alternative, Appellees respectfully move the Supreme Court of the United States to summarily

affirm the decision of the North Carolina Court of Appeals on the basis that the decision of the North Carolina Court is in accord with constitutional principles and requirements. In support hereof, Appellees respectfully submit the following statement of the case and argument.

I. STATEMENT OF THE CASE

Appellants ask the Supreme Court of the United States to accept jurisdiction of a decision of the North Carolina Court of Appeals. Relying on Hunter v. Pittsburgh, 207 U.S. 161 (1907), Raintree Homeowners Assoc. v. City of Charlotte, 543 F.Supp. 625 (W.D.N.C. 1982), aff'd, 710 F.2d 132 (4th Cir.), cert. denied, 104 S.Ct. 536 (1983), and In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981) and applicable North Carolina statutes, the North Carolina Court of

Appeals upheld the trial court's decision that North Carolina's annexation laws and Appellees' actions thereunder were constitutionally sound. Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, et al., 67 N.C.App. 165, 312 S.E.2d 517, pet. denied, _____ N.C. _____, 315 S.E.2d 701 (1984). The Supreme Court of North Carolina dismissed the appeal and denied Appellants' petition for discretionary review.

Notice of appeal to the Supreme Court of the United States was given on July 24, 1984 and Appellants submitted their Jurisdictional Statement on July 27, 1984. Pursuant to Rule 16 of the Rules of the United States Supreme Court, Appellees submit this motion to dismiss the appeal or affirm the decision of the North Carolina Court of Appeals.

II. SUMMARY OF ARGUMENT

At the outset Appellees ask this Court to take note that this is the second time these Appellants have asked the Supreme Court of the United States to consider this case. Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir.), cert. denied, 104 S.Ct. 536 (1983) involved challenges to four annexations in the Cities of Winston-Salem and Charlotte, North Carolina. One of the four cases, Brewer v. City of Winston-Salem, was a challenge to the same annexation as this case. The unreported decision of Erwin, J., United States District Court Judge for the Middle District of North Carolina dismissing that case is set forth in Appendix A. The four cases were consolidated in a per curiam decision by the United States Court of Appeals for the Fourth Circuit and this Court on December 5, 1983,

denied the petition for writ of certiorari. The questions presented in that petition for writ of certiorari are set forth as Appendix B and demonstrate that the issues raised in Appellants' Jurisdictional Statement are virtually the same as in the Baldwin case. The briefs submitted by Appellants then, and now, are substantially the same.

The annexation involved in this appeal went into effect on May 1, 1984. Thus, the residents of the annexed areas have been receiving City services since that date, and have been subject to City taxation since that date.

The decision of the North Carolina Court of Appeals is consistent with the decisions of the Supreme Court of the United States interpreting the Fourteenth Amendment as it applies to annexations.

No substantial federal question therefore exists and this appeal should be dismissed. North Carolina's annexation statutes, and in particular N.C.G.S. 160A-50(f), give substantial protection against arbitrary, capricious and unreasonable acts by a municipality. Protections afforded by North Carolina's statutes comport with due process. The provisions of 160A-50(f) and the statutes incorporated therein amount to a requirement that North Carolina Courts determine whether an annexation is reasonable. Forsyth Citizens, supra, at 166, 312 S.E.2d at 518. The decision of the North Carolina Court of Appeals is consistent not only with Hunter, but also with the subsequent cases of Gomillion v. Lightfoot, 364 U.S. 339 (1960) and Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978).

Contrary to Appellants' allegations, the scope of judicial review of annexations in North Carolina is not limited. Case law makes it abundantly clear that the North Carolina courts will review and decide the constitutionality of annexations and the annexation statutes.

III. REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS

A. Applicable Supreme Court Decisions.

The law applicable to this case is clearly set out by the United States Supreme Court in the case of Hunter v. Pittsburgh, supra. Hunter questioned the validity of an annexation based upon a Pennsylvania statute which permitted a larger municipality to annex a smaller one despite the fact that a majority of the citizens of this smaller municipal corporation desired not to be

annexed. The plaintiffs in Hunter challenged the annexation on a number of grounds, including due process grounds similar to those raised in this case. Hunter at 168-169.

This Court upheld the annexation with the following governing principles:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting

them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all of these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the

> state, and those who legislate for the states are alone responsible for any unjust or oppressive exercise of it. Id. at 178-79.

Thus, in Hunter, this Court made it absolutely clear that the extension of municipal boundaries was a matter governed by state rather than federal law.

Appellants have gone to great lengths in an effort to create the illusion that the legal principles supporting Hunter have been eroded and that Hunter should have "little continuing precedential force." (Jurisdictional Statement, p. 30) Their theory as to Hunter's demise is contradicted by two recent decisions of this Court reaffirming Hunter.

In Gomillion v. Lightfoot, supra, this Court affirmed the basic principles of Hunter. While the Supreme Court originally decided to hear that case in order to

consider issues under both the Fourteenth and Fifteenth Amendments, its decision was based solely upon the Fifteenth Amendment (voting rights denied on the basis of race). In doing so, the Gomillion Court expressly held:

> Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibition of the Constitution considered in those cases. 364 U.S. at 344 (emphasis added).

Gomillion expressly recognizes Hunter to be good law. Gomillion expressly recognizes that Hunter holds that the Fourteenth Amendment's Due Process Clause does not apply to annexations by municipal corporations and re-affirms that holding. The proposition bears restatement: Gomillion expressly

affirms Hunter's holding that a state's authority to modify the boundaries of its political subdivisions is "unrestrained" by the Fourteenth Amendment's Due Process Clause.

The Gomillion opinion makes it clear that its decision in reference to the Fifteenth Amendment does not alter the Hunter decision as to the application of the Fourteenth Amendment—". . .[I]f one principle clearly emerges from the numerous decision of this Court dealing with taxation, it is that the Due Process Clause affords no immunity against mere inequalities in tax burden, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political power." Id. at 343. "When a State exercises power wholly within the domain of state

interest, it is insulated from federal judicial review." Id. at 347.

The constitutional principles established by Hunter were most recently reaffirmed by this Court in Holt Civic Club v. City of Tuscaloosa, supra. While Appellants have quoted one statement from Holt out of context suggesting that Hunter has been "qualified by later cases" (Jurisdictional Statement. p. 38), they fail to recognize that Holt represents a strong affirmation of the underlying principle that the circumstances presented by this case raise no issue of Fourteenth Amendment due process rights.

In Holt, the plaintiff organization challenged a state statute authorizing municipalities to exercise certain powers over persons and property within three miles of their city limits. Persons

residing within the affected extra-territorial area could not vote for the city's elected officials. The Supreme Court dismissed the challenge to the state statute on the grounds that it lacked substantive merit as it "alleged no claim cognizable under the United States Constitution." Id. at 66.

In reaching its determination in Holt, this Court held that persons within the extraterritorial area did not have the constitutional right to vote on municipal policies affecting the persons and property within the subject area. Id. at 69-70. "Thus stripped of its voting rights attire, the equal protection issue presented by appellants becomes whether the Alabama statutes giving extraterritorial force to certain municipal ordinances and powers bear some rational relationship to a

legitimate state purpose." Id. at 70.

In this regard, the Court noted the following:

> Government, observed Mr. Justice Johnson, 'is the science of experiment,' Anderson v. Dunn, 6 Wheat 204, 226 (1821), and a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. This Court has often recognized that political subdivisions such as cities and counties are created by the State 'as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them'. Hunter v. Pittsburgh, 207 U.S. 161, 178. See also, e.g., Sailors v. Board of Education, 387 U.S. at 108 (1967); Reynolds v. Sims, 377 U.S. 533, 575 (1964). In Hunter v. Pittsburgh, the Court discussed at length the relationship between a State and its political subdivisions, remarking: 'The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the

> State.' Ibid. While the broad statements as to state control over municipal corporations contained in Hunter have undoubtedly been qualified by the holdings of later cases such as Kramer v. Union Free School Dist., supra, we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them. Holt at 71 (footnote omitted).

Thus, it is clear that Hunter is alive and well, and is still the governing law as to the questions involved in this case.

This Court concluded "that Alabama's police jurisdiction statutes violate neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment." Id. at 75. Obviously, the same holding is appropriate in this case. As in Holt, the state statute challenged by Appellants is a reasonable exercise of

North Carolina's power to provide for municipal government. Therefore, pursuant to Hunter and Holt, the statute is not subject to this constitutional challenge.

B. The Decision of the North Carolina Court of Appeals Is Consistent With the Law of the Superme Court.

The decision of the North Carolina Court in this case, Forsyth Citizens Opposing Annexation v. City of Winston-Salem, follows the principles of Hunter, Gomillion, and Holt Civic Club and thus no federal question exists. Further, the decision involves the one of the same annexations and the same issues involved in Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir.), cert. denied, 104 S.Ct. 536 (1983). The Fourth Circuit in Baldwin determinted that the Fourteenth Amendment is not violated where, the "proposed annexation does not impinge on fundamental rights or create suspect classifications." Indeed, the

Fourth Circuit's conclusion in this regard was based on the fact that the allegations of the plaintiffs in Baldwin, even if true, did not raise a colorable claim under the Fourteenth Amendment. Baldwin at 135. As the Fourth Circuit pointed out, the exceptions to Hunter which have been recognized by the United States Supreme Court in Gomillion and Holt have not been all alleged in this case. "No suspect classification or fundamental right is therefore implicated and the ordinances thus do not abridge the Fourteenth Amendment to the United States Constitution." Baldwin at 135. See Raintree, 543 F.Supp. 625. See Brewer (Appendix A). See also Citizens Committed to Oppose Annexation v. City of Lynchburg, 528 F.2d 816 (4th Cir.), application denied 423 U.S. 1043 (1976); Garren v. City of Winston-Salem, 463 F.2d

54 (4th Cir.), cert. denied 408 U.S. 1039 (1972); Thompson v. Whitley, 344 F.Supp. 480 (E.D.N.C. 1972)(three-judge district court).

The North Carolina Court of Appeals followed these principles in Forsyth Citizens Opposing Annexation. N.C.G.S. 160A-50(f) and the provisions incorporated therein, the Court said, "amount to a requirement that the courts determine whether an annexation is reasonable." Id. at 166. 312 S.E.2d at 518. Statutory appeal procedures comport with due process and none of the allegations in Gomillion or Hayward v. Clay, 573 F.2d 187 (4th Cir.), cert. denied 439 U.S. 959 (1978), were involved. Following this Court's decision in Hunter, the North Carolina Court of Appeals thus properly affirmed the trial court's judgment upholding the

annexation.

C. The North Carolina Appellate Courts Do Review Annexations to Determine Reasonableness and Compliance With Due Process as Well as Other Constitutional Standards.

Appellants' request for review by this Court is also based on their assertion that under North Carolina law judicial review of annexations is limited and that the North Carolina Appellate Courts will not review the constitutionality or reasonableness of municipal annexations. (Jurisdictional Statement, pp. 40-48). The Appellants are simply incorrect with reference to this basic premise. It is very clear from the decisions of the North Carolina Supreme Court and Court of Appeals that annexations are subject to judicial review for alleged constitutional infirmities, including the general complaints of unreasonableness raised by Appellants.

The first decision concerning the constitutionality of the annexation statutes at issue in this case considered all manner of constitutional questions, including whether those statutes violated due process of law under the Fourteenth Amendment of the United States Constitution. In Re Annexation Ordinance No. 866, 253 N.C. 637, 640-41, 117 S.E.2d 795, 798 (1961). In this seminal decision, it was held that the procedures provided by the statutes are substantial ones which protect the rights of newly-annexed citizens:

> It certainly cannot be considered a mere shell or ritual of conformity when the governing body of a municipality, in good faith, obtains all the information required by the Act, with respect to the character of the area or areas to be annexed, the density of the resident population therein, the extreme boundaries thereof, and the percentage of

> such boundaries which are adjacent or contiguous to the municipality's boundaries, which must be at least one-eighth; and further provides or makes provision to extend all of the governmental services to the newly annexed area or areas; comparable to the services provided for the residents within the city prior to annexation of the new area or areas. 253 N.C. at 647, 117 S.E.2d at 802.

In view of its judicial review of and interpretation of the statutes, the North Carolina Supreme Court held that they were not in violation of due process.

> The petitioners contend that by reason of these annexations in the manner in which they have been brought about, they have been deprived of their liberty and property without due process of law, in violation of Article I, Section 17 of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. The record in these proceedings does not support the petitioners'

> contention in this respect. Certainly it would seem that they do not desire to have their respective properties subject to the levy of city taxes. Even so, where additional territory is annexed in accordance with the law, the fact that the property of the residents in such area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process clause of the State and Federal Constitutions. 253 N.C. at 651-52, 117 S.E.2d at 805.

With respect to whether or not the North Carolina court will review "reasonableness", the North Carolina Supreme Court said in Moody v. Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980): "The review (of annexations) is afforded pursuant to G.S. 160A-50 and serves as a safeguard against unreasonable and arbitrary action by the annexing municipality." The principle that compliance with a constitutional statute establishes

constitutional reasonableness was recognized by Judge McMillan in Raintree Homeowners Association v. City of Charlotte:

> N.C.G.S. 160A-50(f) and the provisions incorporated therein, amount to a requirement that the Supeior Court determine whether an annexation is reasonable. The language of the provisions does not speak in terms of arbitrariness, capriciousness or unreasonableness. However, the effect of the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by the city.

Id. at 629. Accord Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, supra.

The willingness of the North Carolina Supreme Court to consider constitutional questions which are properly raised in state court proceedings is fully illustrated by its consideration of a Winston-Salem annexation. In Re

Annexation Ordinance #D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981). In that case, the North Carolina Supreme Court considered several constitutional questions and addressed generalized grievances concerning the "reasonablenss" of the annexations and held: (1) that the annexation statutes were not an unconstitutional delegation of authority by the state to the governing boards of municipalities; (2) that the statutes were not unconstitutionally vague; (3) that the fact that persons residing within the annexed areas did not get to vote on the matter did not violate either due process or equal protection; (4) that the residents of the annexed areas were protected in their rights to receive municipal services such that no constitutional questions were at issue in that regard;

(5) that unilateral annexation was not unconstitutional as "taxation without representation" pursuant to either due process or equal protection guarantees; and, (6) that the annexation statutes were not unconstitutional on the grounds that judicial review is provided by a judge sitting as trier-of-fact, rather than by way of a jury trial. 303 N.C. at 224-30, 278 S.E.2d at 228-30.

It is obvious from this North Carolina Supreme Court decision and numerous other cases that the North Carolina courts have frequently reviewed constitutional issues in annexation cases. For example, the state courts have considered the applicability of due process guarantees of the Fifth Amendment of the United States Constitution, in addition to those guarantees provided by the Fourteenth Amendment.

E.g., Moody v. Town of Carrboro, supra. The state courts have applied an equal protection analysis in appropriate instances (unlike the annexations herein challenged). E.g., Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980). The North Carolina Supreme Court has demonstrated its willingness to declare annexations to be invalid. E.g., Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980); see also, Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967). The North Carolina Supreme Court will consider whether an annexation based solely upon the desire to generate revenue is invalid. See, In Re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 19, 249 S.E.2d 698, 708 (1978). Further, consistent with the foregoing authority, the state court will

consider impropriety in the annexation process itself if allegations of the same are supported by "competent and substantial evidence". In Re Annexation Ordinance Adopted by the City of Charlotte, 284 N.C. 442, 452, 202 S.E.2d 143, 149 (1974)(challenging an annexation on grounds that "the City 'acted arbitrarily, capriciously, and unreasonably in that it did not uniformly apply the same standards throughout the entire Annexation Area'"). In the Charlotte case cited above, the North Carolina Supreme Court found the annexation of petitioner's land to be invalid and reversed the inclusion of petitioner's lands within the annexed area on the basis of an unreasonable application of the annexation statutes. 284 N.C. at 457, 202 S.E.2d at 152. See also, Forsyth Citizens, supra; In re

Durham Annexation Ordinance, 66 N.C.App. 473, 311 S.E.2d 898 (1984).

It is clear from these opinions that the statutory annexation requirements are carefully reviewed to ensure compliance with constitutional principles.

IV. CONCLUSION

Appellees respectfully submit that the decision of the North Carolina Court of Appelas presents no substantial federal question and is consistent with long-standing principles of law articulated by the United States Supreme Court. The constitutionality of the North Carolina annexation statutes and the review afforded in state court under those statutes has been established in both state and federal courts. For the reasons set forth above, Appellees respectfully submit that this Court should affirm the decision of

the North Carolina Court of Appeals or dismiss the appeal as not presenting a substantial federal question.

Respectfully submitted this 20th day of August, 1984.

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August 20, 1984

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

HENRY BREWER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C-82-801-WS
	)	
CITY OF WINSTON-SALEM, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

JUDGMENT

THIS CAUSE came on for hearing on plaintiffs' motion for summary judgment as to their first and second causes of action, and on defendants' motion for summary judgment, before the undersigned at the Federal Courthouse in Greensboro, North Carolina on Friday, October 1, 1982. At the hearing on said motions the plaintiffs were represented by Mr. Rosbon D. B. Whedbee of Winston-Salem, North Carolina and by Mr. James Hamilton of

the Washington, D.C. law firm of Ginsburg, Feldman, Weil and Bress, Chartered; and the defendants were represented by Roddey M. Ligon, Jr. of the Winston-Salem law firm of Womble, Carlyle, Sandridge & Rice, and by City Attorney Ronald G. Seeber. The Court, having considered the pleadings, affidavits, motions, briefs, and oral arguments, adjudges as follows:

1. Plaintiffs' First Cause of Action.

The plaintiffs moved for summary judgment on their first cause of action asserting that the annexations by the City of Winston-Salem challenged by this action are unconstitutional in that they cannot be subject to proper judicial review under state law. With respect to this contention, this Court adopts the opinion of Chief Judge Ward entered in the case of Baldwin, et al. v. City of Winston-Salem, et al., C-81-838-WS,

filed July 28, 1982, and dealing with the same issue as that raised in this portion of plaintiffs' motion.

The memorandum opinion of Chief Judge Ward states, in part:

"Both the United States Supreme Court and the Fourth Circuit Court of Appeals have unequivocally resolved the dispositive legal issue presented in this case. In Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), the court stated:

> 'Hunter v. Pittsburgh (1907) 207 U.S. 161, 178-179, 28 S.Ct. 40, 52 L.Ed. 151, declared that annexation by a city or town is purely a state political or legislative matter, entirely within the power of the state legislature to regulate. Its language was sufficiently broad, as an unfriendly commentator has observed, "to dispose of every conceivable challenge to annexation." . . . Thus, it has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds.'

Accord, Carlisle v. City of Charlotte, ____ F.Supp. ____ (W.D.N.C. 1982)(C-C-81-533-M,

July 13, 1982).

This Court is bound to follow the decision of the Fourth Circuit and cannot distinguish its language from the facts of this case.[1] Plaintiffs fail to state a claim upon which relief can be granted under the fourteenth amendment.

IT IS, THEREFORE, ORDERED that plaintiffs' Motion for Partial Summary Judgment be, and same hereby is, DENIED. For the reasons stated therein, the plaintiffs' motion for summary judgment as to its first cause of action must be denied.

2. Plaintiffs' Second Cause of Action.

The plaintiffs next move for summary judgment on their second cause of action.

---

[1]Exceptions to the rule stated in Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), do not arise in this case."

They assert that the annexations by the City challenged in this action are unconstitutional because persons such as plaintiffs Henry Brewer, Robert M. Bircham and Gladys Norman reside or operate businesses in the annexed areas but do not own real property in the annexed areas; and, therefore, cannot seek judicial review of the annexation under the North Carolina statutes. The defendants respond that the North Carolina law allows any property owner—not just real property owners—to challenge North Carolina annexations. During oral argument counsel for the plaintiffs and defendants advised the Court that Henry Brewer, Robert M. Bircham and Gladys Norman are parties plaintiff to a pending action in the Superior Court of Forsyth County, North Carolina, which said action challenges the validity of the annexations involved here. Consequently, this

is of the opinion that this portion of plaintiffs' motion for summary judgment is moot. This Court does not feel that these plaintiffs may, at this time, contend in this Court that they do not have a right to contest the annexations in state court when they are in fact at this time contesting the annexations in state court. Thus, the Court feels that the plaintiffs' motion for summary judgment as to their second cause of action must be denied. The Court holds, however, that should the state court judicially determine that the above-named plaintiffs do not have standing to contest the validity of the annexation in state court, plaintiffs would be authorized to reopen this case in order to raise this issue at that time.

3. Defendants' Motion for Summary Judgment.

The defendants move for summary judgment

as to all of plaintiffs' claims. For the reasons stated herein, as well as those stated in the Memorandum Opinion of Chief Judge Ward adopted by this Court, the defendants' motion for summary judgment should be allowed.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that the plaintiffs' motion for summary judgment on the first cause of action is denied; that plaintiffs' motion for summary judgment on the second cause of action is deemed to be moot and thus denied subject to the right of plaintiffs Henry Brewer, Robert M. Bircham and Gladys Norman to reopen this case in the event the state coult should hold that said plaintiffs do not have standing in the state court action; and, the defendants'

motion for summary judgment is allowed.

s/Richard C. Erwin
United States District Judge

November 16, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

HENRY BREWER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C-82-801-WS
	)	
CITY OF WINSTON-SALEM, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER OF DISMISSAL

This matter came before the court for a hearing on October 1, 1982 for ruling on plaintiffs' motion for summary judgment as to the first cause of action, plaintiffs' motion for summary judgment as to its second cause of action, and defendants' motion for summary judgment. For the reasons stated in the judgment, IT IS ORDERED that this action be, and the same hereby is, dismissed. However, the plaintiffs Henry Brewer, Robert M. Burcham and Gladys

Norman shall have leave to reopen this case in the event that the state court holds that they do not have standing in the annexation proceeding now before it.

s/Richard C. Erwin
United States District Judge

November 16, 1982

APPENDIX B

QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the Fourteenth Amendment prohibit arbitrary actions by municipalities in annexing territory?

2. Does the due process clause continue to require judicial review by state courts of constitutional challenges to state action?

(From "Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit" in Baldwin, et al. v. City of Winston-Salem, et al. No. 83-572)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the MOTION TO DISMISS OR AFFIRM was served on opposing counsel on the 24th day of August, 1984.

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